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No. 92-1988

In the Supreme Court of the United States

October Term, 1993

TICOR TITLE INSURANCE COMPANY, et al.,
Petitioners,

v.

WALTER THOMAS BROWN and
JEFFREY L. DZIEWIT,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF TRIAL LAWYERS FOR PUBLIC JUSTICE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

Trial Lawyers for Public Justice, P.C. ("TLPJ") is a national public interest law firm devoted to representing victims of corporate and government abuse. TLPJ has pioneered cases in toxic torts, environmental protection, civil rights, civil liberties, consumer safety, and employee protection. Supported by more than 1,300 trial lawyers throughout the United States, TLPJ is dedicated to using plaintiffs' tort law and trial law for the public good and to vindicate the rights of individuals.

The present case raises significant issues regarding the protection of due process rights of individual victims in class action proceedings. In Phillips Petroleum v. Shutts, 472 U.S. 797 (1985), this Court held that individual class members in a state court action have a due process right to opt out of class actions wholly or predominately for money damages. Petitioners, however, urge this Court to now hold that individual class members have no such right in identical cases filed in federal courts. TLPJ submits this brief because we believe, and the constitutional history of class actions demonstrates, that the right to opt out is as important to individual class members in federal court cases as in state courts cases--and is a fundamental element of due process.[1]

SUMMARY OF ARGUMENT

Rooted deep in our historic tradition is the fundamental principle that each individual must be afforded the opportunity for his own day in court. Class actions have been an exception to this principle--but an exception of only limited scope and of

[1] Pursuant to Rule 37 of the Rules of this Court, TLPJ has obtained the consent of the parties to the filing of this brief. The parties' letters of consent have been filed with the Clerk of Court.

application only when it is manifest that the due process rights of absent class members will be assured.

In their early development, class actions were strictly circumscribed to situations involving cohesive groups, common property and equitable relief. Over the years, the doctrine expanded to encompass damages at law and more diffuse groups and more abstract legal relationships. But as the power of the class device has grown, so too has judicial recognition of the constitutional imperatives of due process protections for each individual class member. Thus, this Court's decision in Shutts, recognizing the constitutional import of the right to opt out of a state court class action, is but one in a line of modern decisions emphasizing the due process implications of this powerful procedural device.

In the present case, petitioners argue that the Shutts due process protections do not apply in federal court. Petitioners' assault on due process rests upon two arguments: the jurisdictional reach of federal courts and a "procedural fairness" analysis. TLPJ, in this brief, does not address the jurisdictional issue since, it respectfully submits, the procedural fairness/due process analysis so forcefully supports the right to opt out of a federal class action wholly or predominately for damages at law.

Petitioners' arguments to the contrary are based upon an erroneous view of the historical and constitutional bases of class actions. Petitioners argue that there is no distinction, from a constitutional perspective, between damage claims and equitable relief. However, this distinction has long been recognized in the common law and is incorporated in Rule 23 of the Federal Rules of Civil Procedure. Injunctive relief, by its very nature, is unitary and must be imposed upon a group as a whole to be effective. Similarly, when a common fund is involved, the rights of each stakeholder are necessarily intertwined, whether or not each person is defined as a class member. By contrast, in most cases at law, damage claims

present issues unique to each individual. Class members in these cases often share nothing in common except for vague, abstract legal rights. As the scope of the class broadens in this manner, and the interests of individuals diverge, it becomes more difficult to ensure the rights of class members. This requires a heightened due process scrutiny--and, by necessity, a right to opt out.

In the present case, the fact that the original class in the Multidistrict Litigation proceeding was certified as a mandatory class under Rule 23(b)(1) and (b)(2) is not controlling. First, it is clear that this certification was in error, at least with respect to the substantial damage claims. Second, the label given to a class under Rule 23(b) cannot be used to circumvent the constitutional rights of absent class members.

In their brief, petitioners venture far beyond a discussion of what is a proper mandatory class and far beyond the contours of their own antitrust case. Indeed, petitioners conclude their brief with a suggestion to redraft Rule 23 to eliminate the statutory right to opt out even in a (b)(3) class action solely for damages. The alleged basis for this radical proposal is petitioners' assertion that mandatory damage classes are needed to resolve the recent "explosion of duplicative litigation," particularly in the mass tort context. Brief of Petitioners at 29. This allegation regarding the burden of mass tort litigation on the federal courts lacks--and is indeed contrary to--supporting empirical evidence. Moreover, mass tort actions are among the cases least suited for class action treatment of any type because tort damage claims are typically highly individualized and unliquidated. In their sweeping plea for the extension of mandatory classes, petitioners demonstrate a fundamental misunderstanding of the historical and constitutional framework underlying the class action doctrine. The vast power and reach of any class action, and most particularly a nationwide class action for damages at

law, mandate that each individual's due process rights be jealously guarded.

ARGUMENT

I. THE HISTORY OF CLASS ACTIONS ESTABLISHES THE RIGHT TO OPT OUT AS A CONSTITUTIONAL MANDATE IN A CLASS ACTION INVOLVING CLAIMS WHOLLY OR PREDOMINATELY FOR DAMAGES AT LAW

A. The Early Years of Class Actions: Cohesive Groups and Common Funds

1. The Early Years in England

In England, the history of group litigation reaches back, perhaps to the Twelfth Century, with suits involving villagers or parishioners in a collective, medieval agricultural society. Stephen C. Yeazell, From Medieval Group Litigation to the Modern Class Action 38-39 (1987). Through the Seventeenth Century, and into the courts of Chancery with Bills of Peace, group litigation was a natural--and necessary--phenomenon in a society dominated by cohesive social and economic groups whose members' interests were indispensably linked together. Id. at 104; Stephen C. Yeazell, From Group Litigation to Class Action, Part I: The Industrialization of Group Litigation, 27 UCLA L. Rev. 514, 515-16 (1980). Indeed, this early period was a "world in which group litigation may not have made a great deal of difference because the line between the recognition of a litigative entity and the effects of simple stare decisis was thin indeed." Id., 27 UCLA L. Rev. at 519.

2. The Early Years in the United States

The English experience did not transfer intact to the United States. Among other factors, in the United States, unlike in England, "we had to worry about the 'due process' clause." Zechariah Chafee, Jr., Some Problems of Equity 225 (1950). As Professor Chafee stated in his classic treatise:

> However convenient class suits may be, it is obvious that they do not comply with some well-recognized general principles of law. The incongruity which startles us today is the disregard of the requirement that a man ought to have his day in court--his rights and duties should not be adjudicated in his absence.

Id. at 203.

Early American efforts to reconcile group litigation and due process, and to determine the res judicata effect of class judgments on nonparties, were marked by "considerable uncertainty." 7A Charles A. Wright et al., Federal Practice and Procedure: Civil § 1751, at 12 (2d ed. 1986). For example, Federal Equity Rule 48, adopted in 1842, provided general guidance for class suits and ended with the directive that "in such cases, the decree shall be without prejudice to the rights and claims of all the absent parties."[2] But a decade later, in

[2] Federal Equity Rule 48 stated, in full:

> Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But in such cases the decree shall be without prejudice to the rights and claims of all the absent parties.

42 U.S. (1 How.) lvi (1842).

one of the first class suits in the United States, the Supreme Court ignored this clear mandate--and indeed never even cited Rule 48--and stated that "the decree binds all of them the same as if all were before the court." Smith v. Swormstedt, 57 U.S. (16 How.) 288, 303 (1853).

Petitioners' assertion that Smith demonstrates the long history of "mandatory classwide adjudication of monetary claims" is a gross simplification, and, indeed, a misreading of the case. See Brief of Petitioner at 9. Smith involved a dispute over a common fund, or, in the words of the Court, "an object common to them all." 57 U.S. (16 How.) at 302.[3] With such a fund, the claims of class members are necessarily intertwined and must be adjudicated as a group. In addition, the language in Smith regarding the binding effect of a decree was only dicta since a court may not determine the res judicata effect of its own judgment, and Smith did not involve a collateral attack. See 7B Wright et al., supra, § 1789, at 245.

Moreover, following Smith, the Court vacillated on the issue of the binding effect of judgments. In Wabash R. R. v. Adelbert College, 208 U.S. 38, 58 (1908) the Court found no binding effect on absent members because "injustice might result, and even collusive suits might be encouraged." Then, in 1912, Equity Rule 38 replaced old Rule 48, and omitted the last sentence regarding the binding effect of decrees.[4] Nevertheless, the "confusion and uncertainty" continued. 7A Wright et al., supra, §1751, at 13. In Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921), the Court noted the desirability of binding decrees (in a case, once again, involving a common fund). But the Court "revived some of the doubt" in Christopher v. Brusselback, 302 U.S. 500 (1938), by limiting the binding effect of decrees. 7A Wright et al., supra, §1751, at 14.

In short, in these early years in the United States, the class action doctrine was ill-defined, and class suits "never found a regular or essential place in group litigation." Stephen C. Yeazell, From Group Litigation to Class Action, Part II: Interest, Class and Representation, 27 UCLA L. Rev. 1067, 1095 (1980) [hereinafter Yeazell, Interest, Class and Representation]; Chafee, supra, at 199. Class actions were infrequent and primarily restricted to cases involving common funds and groups whose interests were inextricably intertwined. See, e.g., Yeazell, Interest, Class and Representation, supra, at 1095 (class actions in this period were used principally in inheritance litigation and creditors' suits "to achieve something like an equitable marshalling of assets.").

In addition, class suits in the United States were originally limited to equity actions:

> This was true not only because of the rigid common law rules discouraging joinder of parties inherited from England but because the machinery of the law courts was not well adapted to protect the rights of unknown, unnamed, or nonparticipating persons whose interest in the dispute might be concluded by the litigation.

7A Wright et al., supra, § 1751, at 11 (emphasis added); see also 1 Herbert B. Newberg & Alba Conte, Newberg on Class Actions § 1.09, at 1-24 n.85 (3d ed. 1992). Not until the merger of law and equity, and original Rule 23, did class

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3 The common fund in Smith was a church's endowment "for the relief of distressed traveling preachers." Id. at 303. The fund became the subject of dispute when Northern and Southern preachers split over the issue of slavery. Id. at 296.

4 Federal Equity Rule 38, in full, stated, "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole." 226 U.S. app. at 11 (1912).

action suits for damages at law become available in federal courts. 1 id. at 1-25.

3. Original Rule 23

Original Rule 23, Fed. R. Civ. P., promulgated in 1937, specifically defined three categories of classes. Only two of the categories--"true" and "hybrid"--bound an entire class to any judgment. See generally 3B James W. Moore & John E. Kennedy, Moore's Federal Practice ¶ 23.02-1, at 23-73 (2d ed. 1993). Mirroring the case law of that time, these two categories applied in only limited circumstances. "True" classes involved principles of compulsory joinder and were based upon "common and undivided" rights. 3B id.; Snyder v. Harris, 394 U.S. 332, 335 (1969). "Hybrid" classes were restricted to "specific property involved in the action."[5]

The third category under the rule--the common question class--was not really a class action at all. 7A Wright et al., supra, § 1777, at 517. Called a "spurious" class, this third type was in reality nothing more than a device for permissive joinder. 7A id. § 1752, at 29.[6] A judgment in a "spurious" class was binding only upon the parties and class members who affirmatively chose to intervene in the action; in other

[5] "True" classes were defined by the rule as involving rights which were "joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it." "Hybrid" classes involved rights which were "several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action." Fed. R. Civ. P. 23(a)(1), (2) (1938), 28 U.S.C. app. at 6101 (1964).

[6] "Spurious" classes were defined by the rule as involving rights which were "several, and there is a common question of law or fact affecting the several rights and a common relief is sought." Fed. R. Civ. Pro. 23(a)(3) (1938), 28 U.S.C. app. at 6101 (1964).

words, a type of opt-in procedure. 3B Moore & Kennedy, supra, ¶ 23.02-1, at 23-73.[7]

Thus, original Rule 23 reflected the traditional doctrine of restricting class actions--at least those with binding effect--to a narrow category of cases where the members' rights were, in essence, indivisible. The earlier cases of Smith and Supreme Tribe of Ben-Hur, for example, where the Court had found a binding effect, would have been classified as "true" class actions under original Rule 23 because of the unitary interests of the class. Moore, supra, 25 Geo. L.J. at 573.

B. The Modern Era: The Extension of Class Actions and The Increasing Recognition of Due Process Rights

1. The Decisions in Hansberry and Mullane

In the wake of original Rule 23, this Court began to lay the foundation for its modern analysis of due process protections for individual class members with its opinions in Hansberry v. Lee, 311 U.S. 32 (1940), and Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). Neither case was actually decided under Rule 23. Yet to this day these two decisions stand as exemplars of due process analysis in class actions.

In Hansberry, this Court refused to bind persons to an earlier judgment upholding a restrictive racial covenant, emphasizing the lack of adequate representation of absent parties:

[7] Actually, original Rule 23 itself did not discuss the binding effect of the various types of classes, nor coin the terms by which the categories were to become known. Instead, Professor Moore advanced the terms "true," "hybrid" and "spurious" and defined the preclusive effect of judgments under each type. James W. Moore, Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft, 25 Geo. L.J. 551 (1937). Moore's writings "had almost as much influence upon the judges as if it had been embodied in Rule 23." Chafee, supra, at 251.

> Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires.

311 U.S. at 45.

Although Hansberry has come to stand primarily for the principles of adequate representation, the Court in Hansberry did not limit due process to this one protection. Indeed, the Court noted that there are no "particular rules" for a due process analysis. Id. at 42. Instead, the Court stated:

> [T]here has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it.

Id.

In Mullane, the issue was the adequacy of notice to beneficiaries of a common trust fund. As in Hansberry, the Court focused its analysis on one aspect of due process, but clearly stated that due process was not limited to this one element:

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

339 U.S. at 313 (emphasis added). The Court held that notice by publication alone was constitutionally deficient and that all beneficiaries with known addresses were due individual notice.[8]

2. The 1966 Amendments to Rule 23

The 1966 amendments to Rule 23 ushered in a sweeping expansion of the reach of class actions. At the same time, however, there was an increased recognition of the need to diligently protect the due process rights of absent class members.

These amendments brought Rule 23 to essentially its present form.[9] "True," "hybrid" and "spurious" classes were transformed, in one manner or another, into classes under new subsections (b)(1), (b)(2) and (b)(3). The new (b)(1) and (b)(2) actions--i.e., mandatory classes--generally tracked those types of class actions traditionally found to have preclusive effect. The (b)(1) class applied to situations where individual actions would create a risk of "inconsistent or varying adjudications. . . which would establish incompatible standards

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[8] The Court stated:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Id. at 314. The Court also added, "[W]hen notice is a person's due, process which is a mere gesture is not due process." Id. at 315.

[9] For discussion of the 1966 amendments, see Benjamin Kaplan, Continuing work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356 (1967) and Sherman L. Cohn, The New Federal Rules of Civil Procedure, 54 Geo. L.J. 1204 (1966).

of conduct" or which would "as a practical matter be dispositive of the interests of the other members not parties." Fed. R. Civ. P. 23(b)(1). In large part, the (b)(1) class was based on principles of joinder. Fed. R. Civ. P. 23, Advisory Committee Notes (1966 Amendment) [hereinafter Advisory Committee Notes]. The (b)(2) class was primarily for injunctive or declaratory relief, Fed. R. Civ. P. 23(b)(2), and did not extend to cases "exclusively or predominately" for money damages. Advisory Committee Notes, supra.[10]

In contrast, the new (b)(3) opt-out class represented a sharp break with the history of class actions insofar as it applied the class device to "common question" cases seeking damages at law.[11] The Preliminary Draft of the new rule, published in 1964, was so extreme that it provided only a limited opt-out right in (b)(3) actions, stating:

> In any class action maintained under subdivision (b)(3), the court shall exclude those members who, by a date to be specified, request exclusion, unless the court finds that their inclusion is essential to the fair and efficient adjudication of the controversy and states its reasons therefor.

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[10] See also 1 Newberg & Conte, supra, § 1.22, at 1-51 (these two mandatory classes "are analogous to interpleader or quasi-in-rem suits in which equitable circumstances dictate the need for a unitary adjudication regardless of the individual consent of the parties affected.").

[11] Two primary considerations led to the revision of the old "spurious" class. One was a concern about the unfairness of one-way intervention in "spurious" suits, where class members--at no risk of being bound by an unfavorable judgment--could intervene after an adjudication favorable to the class but prior to formal judgment. 3B Moore & Kennedy, supra, ¶ 23.60, at 23-439. The other major concern was the viability of small-claims class actions, whose members may have lacked sufficient incentive to take the affirmative action of opting into a class suit. Kaplan, supra, at 397-98.

Committee on Rules of Practice and Procedure, Preliminary Draft of Proposed Amendments to the Rules of Civil Procedure, 34 F.R.D. 325, 386 (1964) (Rule 23(c)(2)) (emphasis added). However, the final version of Rule 23 dropped this last clause, leaving no discretion for courts to impinge upon this essential right to opt out in the type of cases for which subsection (b)(3) was meant to encompass, that is, where the claims were wholly or predominately for damages at law.

The new rule also incorporated other due process protections for absent class members, including the requirements of notice and adequate representation, as defined in Hansberry and Mullane, supra. In addition, the rule clearly envisioned that further due process protections--beyond those expressly stated in the rule--might be necessary in a given case. For example, subsection (d) provided "a non-exclusive list" of possible orders that courts could enter to protect class members. 7B Wright et al., supra, § 1791, at 286-87. The Advisory Committee also emphasized that the rule "does not disturb the recognized principle that the court conducting the action cannot predetermine the res judicata effect of the judgment; this can be tested only in a subsequent action." Advisory Committee Notes, supra.

Even as finally promulgated with these protections, new Rule 23 provoked controversy, with the extension of common question classes regarded as the "most controversial" and "most doubtful" change. 7B Wright et al., supra, § 1783, at 71; Charles A. Wright, Proposed Changes in Federal Civil, Criminal and Appellate Procedure, 35 F.R.D. 317, 338 (1964). Leading commentators at the time expressed deep concerns, which they ultimately assuaged with the expectation that courts would vigilantly guard due process rights.

Among those most concerned was Justice Black, who submitted a statement objecting to the new rules, and, in particular, Rule 23:

> I particularly think that every member of the Court should examine with great care the amendments relating to class suits. It seems to me that they place too much power in the hands of the trial judges and that the rules might almost as well simply provide that "class suits can be maintained either for or against particular groups whenever in the discretion of a judge he thinks it is wise." The power given to the judge to dismiss such suits or to divide them up into groups at will subjects members of classes to dangers that could not follow from carefully prescribed legal standards enacted to control class suits.

Amendments to Rules of Civil Procedure, 383 U.S. 1029, 1035 (1966) (Statement of Black, J., dissenting).

Professor Wright also voiced concerns, stating:

> In the situation which (b)(3) covers, there is a strong feeling that the person who wants to go it alone, and to bring his individual action with his own lawyer, should be permitted to do so. . . . Even with this protection [of the right to opt out], (b)(3) is a novel and controversial proposal. . . .

Wright, supra, 35 F.R.D. at 338.

Judge Frankel also called the sweep of the (b)(3) class "among the more debatable" provisions of Rule 23 and compared the opt-out procedure to the Book-of-the-Month Club. Marvin E. Frankel, Some Preliminary Observations Concerning Civil Rule 23, 43 F.R.D. 39, 44 (1967). He indicated his preference for an affirmative opt-in procedure, so that silence would not constitute consent to inclusion. Marvin E. Frankel, Amended Rule 23 From a Judge's Point of View,

32 Antitrust L.J. 295, 299 (1966). In the end, he urged that Rule 23 not "be pressed to the limits of its logic or to the literal dimensions that its language might possibly suggest," id. at 297, and that judges extend the protections of Rule 23:

> I would suspect that the courts will not be insensitive to such potentially sweeping consequences. It seems probable that they will look soberly at the criteria given for their guidance, and at others they are entitled and invited to evolve, before allowing and defining a class under the new rule.
>
> . . .
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> . . . . [T]his realm of discretion marks the ground on which the new rule will be vindicated or destroyed. It is a robust challenge to all of us.

Id. at 297, 301 (emphasis added).[12]

More recent commentators also have recognized that the 1966 expansion of class actions mandated an increasing emphasis on due process rights. See, e.g., 7B Wright et al., supra, § 1791, at 288 ("Inasmuch as the binding effect of class actions has been significantly expanded by the 1966 amendment to Rule 23, courts must be even more sensitive to the protection of absentees than they have in the past." (footnote omitted)).

Thus, Rule 23 clearly contemplates--and the constitution mandates--that due process protections in addition to those specifically mandated in the rule may be necessary, depending upon the nature of the class. Indeed, Rule 23(d) provides authority to allow the right to opt out in "mandatory" classes.

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[12] Given Judge Frankel's sentiments, it is disingenuous for petitioners--with an out-of-context citation--to rely upon Judge Frankel in arguing that Rule 23 protections should be dismantled. See Brief for Petitioners at 30.

7B Wright et al., supra, § 1796.1 (Supp. 1993) (citing County of Suffolk v. Long Island Lighting Co., 710 F.Supp. 1407 (E.D.N.Y. 1989), aff'd, 907 F.2d 1295 (2d Cir. 1990)). See also 3 Newberg & Conte, supra, § 17.16, at 17-44 to -45 ("Whenever unliquidated damages are sought for individual injuries suffered, whether sought as the primary or ancillary relief, then such claims are necessarily uncommon with the class representative's claims. . . . Accordingly, when unliquidated damages are involved, the exclusion right must be afforded as a constitutional matter, regardless under which Rule 23(b) category the class may be certified."); Manual for Complex Litigation, Second, § 30.231, at 229 (1985); 3B Moore & Kennedy, supra, ¶ 23.45[1], at 23-292 & n.20.[13]

[13] Thus, due process rights may not be circumvented by the label given to a class. In the present case, the action was classified as a (b)(1) and (b)(2) class in the original Multidistrict Litigation ("MDL") proceeding. In re Real Estate Title & Settlement Services Antitrust Litigation (I), 1986-1 Trade Cas. (CCH) ¶ 67,149, at 62,928-29 (E.D.Pa. 1986), aff'd without opinion, 815 F.2d 695 (3d Cir. 1987), cert. denied, 485 U.S. 909 (1988). This classification was erroneous. As two appellate courts stated, the settlement "involved the foreclosure of substantial damage claims." See In re Real Estate Title & Settlement Services Antitrust Litigation (II), 869 F.2d 760, 768 (3d Cir.) (emphasis added), cert. denied, 493 U.S. 821 (1989); Brown v. Ticor Title Ins. Co., 982 F.2d 386, 392 (9th Cir. 1992)(emphasis added). Accordingly, the class should have been certified, at least in part, under subsection (b)(3). Moreover, regardless of the category of certification, absent class members should have been entitled to the right to opt out, at least with respect to their damage claims. Indeed, Ticor illustrates the worst of all possible scenarios from a due process perspective: all individual damages claims were extinguished, with no individual notice and no right to opt out--and with no monetary payment whatsoever. As the Third Circuit stated, plaintiffs in the MDL litigation "lost more than the absent plaintiffs lost in Shutts, and yet were given fewer procedural protections." In re Real Estate Title (II), 869 F.2d at 762.

3. Post-1966 Decisions and the Distinctions Between Claims for Damages at Law And Equitable Relief

After the 1966 rule changes, and the expansion of class actions into a new domain, this Court was even more emphatic about the necessity of protecting the rights of individual class members.[14]

In one of its early major post-1966 decisions, Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), this Court demonstrated the full extent to which the rights of individual class members must be safeguarded under amended Rule 23. Eisen raised the issue of adequate notice in a Rule 23(b)(3) antitrust and securities class action with six million members and a class representative with only a $70 stake. Despite the size of the individual claims, the Court held that the class could proceed only with individual notice to all two million class members whose names and addresses could be identified with reasonable effort. Id. at 176. Since the petitioner represented he would not bear this cost, the Court remanded the case "with instructions to dismiss the class action as defined." Id. at 179.

Significantly, the Court in Eisen stated that such notice was required so that each individual class member "may request exclusion from the action and thereby preserve his opportunity to press his claim separately. . . ." Id. at 176. See also Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 351 (1983) ("Eisen's notice requirement was intended to inform the class member that he could 'preserve his opportunity to press his claim separately' by opting out of the class." (emphasis in original)).

[14] Cf. Martin v. Wilks, 490 U.S. 755, ___, 109 S.Ct. 2180, 2184 (1989) (recognizing "our 'deep-rooted historic tradition that everyone should have his own day in court.'").

The Court in Eisen also distinguished monetary relief at law from equitable relief, limiting its holding to common question class actions for damages, as opposed to classes under subdivision (b)(2) "for injunctive or declaratory relief." 417 U.S. at 177 n.14.

Against this backdrop, the decision in Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985), was merely a basic reaffirmance of minimum due process protections necessary in class actions. Although the precise holding focused on personal jurisdiction, the entire opinion and the history of class actions clearly demonstrate Shutts' underpinnings in principles of fundamental fairness under a due process analysis.

Shutts confirmed that "a chose in action is a constitutionally recognized property interest possessed by each of the plaintiffs." Id. at 807 (emphasis added). Although the Court upheld Rule 23's opt-out provision against a challenge that only an opt-in procedure would satisfy due process, id. at 813-14, the Court emphasized that this right to opt out could not be abridged in a class action for money damages:

> [W]e hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court.

Id. at 812 (emphasis added). In note three, the Court distinguished claims for equitable relief, limiting its holding to class actions "which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments. We

intimate no view concerning other types of class actions, such as those seeking equitable relief." Id. at 811 n.3.[15]

Thus, to a large extent, the decision in Shutts (as in Eisen) merely confirmed the long-standing historical distinction between damages at law and equitable relief in the class action context, a distinction based upon the reluctance to extend class actions beyond their traditional bounds without, at a minimum, the most stringent protection for absent members. Petitioners' claim that Shutts does not apply in the context of the present case and that mandatory damage classes would

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[15] There is another fundamental difference between damages at law and equitable relief in the class action context. Equitable claims, of course, are not covered by the Seventh Amendment right to a trial by jury. But it has long been established that jury trials are required in class action proceedings for damages at law. See Ross v. Bernhard, 396 U.S. 531, 541 (1970). The right to jury trial is "fundamental and sacred," Jacob v. City of New York, 315 U.S. 752, 752 (1942), and scrupulously protected. Thus, the Court stated in Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959):

> In the Federal Courts this right cannot be dispensed with, except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency.

Id. at 510 (quoting Scott v. Neely, 140 U.S. 106, 109-10 (1891)); see also Chauffeurs, Teamsters, and Helpers, Local 391 v. Terry, 494 U.S. 558, __, 110 S. Ct. 1339, 1345 (1990) ("any seeming curtailment of the right to a trial by jury should be scrutinized with the utmost care" (quoting Beacon Theatres, 359 U.S. at 502)); Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937) ("as the right of a jury trial is fundamental, courts indulge every reasonable presumption against waiver."). Clearly, at a minimum the right to opt out must be preserved when the right to trial by jury is implicated. See 9 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure: Civil §2321, at 104 (1971) ("A waiver by one party cannot bind other parties. The right to a jury trial runs to every party." (footnote omitted)).

comport with the development of Rule 23 and due process have no basis in historical reality.[16]

II. PETITIONERS' RADICAL SUGGESTION FOR MANDATORY CLASSES IN MASS TORT LITIGATION DEMONSTRATES A FUNDAMENTAL MISUNDERSTANDING OF THE HISTORICAL AND CONSTITUTIONAL FRAMEWORK UNDERLYING THE CLASS ACTION DOCTRINE

Given the history of class actions and the constitutional principles at stake, petitioners' suggestion that there is no constitutional right to opt out of any class action--and that the Rule 23(b)(3) opt-out right should be reconsidered--is a radical proposition.[17] Petitioners seek to justify this exhortation by claiming that mandatory classes are necessary to alleviate the burden of mass tort litigation on the federal courts. Even assuming that policy considerations can overcome constitutional imperatives, which they of course cannot, petitioners fail to recognize that mass tort actions are among the least suited type of case for any type of class action proceeding. Moreover, as noted in further detail below,

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[16] Petitioners assert that "this Court and the lower federal courts have frequently upheld mandatory class actions that included monetary claims." Brief of Petitioner at 19. However, the sole citation petitioners provide for a Supreme Court case is Califano v. Yamasaki, 442 U.S. 682 (1979), a class action regarding the right of Social Security recipients to pre-recoupment hearings. This Court specifically noted in Califano that the relief below involved injunctions and that the Ninth Circuit, in affirming the class-wide relief, believed "that, because respondents did not seek damages, no manageability problems were present." Id. at 688-90 (emphasis added).

[17] See Brief of Petitioners at 28 (arguing against "a constitutional right to opt out of any properly certified class action, regardless of whether it includes monetary claims.").

contentions about a crises in the tort system are greatly exaggerated.[18]

From an historical perspective, the journey from the traditional class action to the mass tort case is of truly staggering dimensions: from cohesive, equitable classes to groups of individuals with no pre-existing or continuing legal relationships with each other and with highly-individualized and highly-personal injury claims for damages at law.

Even the 1966 Advisory Committee--while drafting a rule extending the reach of common question class actions--was careful to note that a "mass accident is ordinarily not appropriate for a class action." Advisory Committee Notes, supra. In a mass tort action, the claims are so personal that there is "a general feeling . . . that each person should have the right to prosecute his own claim and be represented by the lawyer of his choice." Yandel v. PPG Indus., Inc., 65 F.R.D. 566, 569 (E.D. Tex. 1974). See also 3B Moore & Kennedy, supra, ¶ 23.45[4.-1], at 23-335 to -336 ("In personal injury actions the fact that the litigation vitally affects a significant aspect of the plaintiffs' lives is a factor in favor of individual litigation."). In some cases, the claims literally implicate matters of life and death.

In addition, while there may be some common issues in a mass tort action, the damage claims are usually highly

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[18] Despite the focus of the brief of the American Insurance Association, et al., as amici curiae, the present case does not raise the issue of a limited fund class action under Rule 23(b)(1)(B), and thus TLPJ respectfully submits that this Court should avoid any ruling that would impact this troublesome area of class action litigation. It should be noted, however, that such classes in mass tort litigation often raise serious issues of abuse of Rule 23 procedures. See Keene Corp. v. Fiorelli, No. 93-7712, 1993 U.S. App. LEXIS 31268, slip op. at 13 (2d Cir. Dec. 1, 1993)("it is clear that the complaint is an attempt to compel an adjustment of Keene's creditors' rights outside the Bankruptcy Code. . . .").

individualized and unliquidated. The severity of injury and size of claim varies dramatically from victim to victim. The emotional stake varies accordingly--and the individual's interest in controlling his own litigation to vindicate deeply-personal rights is often paramount.

These divergent--and potentially conflicting--interests regarding damage claims raise serious concerns about the adequacy of representation in a mass tort class. When interests diverge, adequate representation becomes difficult, if not impossible, to secure. See Hansberry v. Lee, supra. The right to a jury trial also is a powerful consideration. As this Court stated in Wooddell v. Int'l Brotherhood of Elec. Workers, Local 71, ___ U.S. ___, ___, 112 S. Ct. 494, 498 (1991), "[a] personal injury action is of course a prototypical example of an action at law, to which the Seventh Amendment applies."

Recent experience with mass tort class actions demonstrates why the right to opt out is of such critical import. In the real world, the type of mass tort class action that defendants typically advocate is not a litigation class, but, instead, a class for settlement purposes only. See, e.g., Keene Corp., supra, 1993 U.S. App. LEXIS 31468 (class action filed against asbestos victims for sole purpose of seeking a mandatory settlement); Carlough v. Amchem Prods. Inc., 5 F.3d 707, 711 (3d Cir. 1993) (class action complaint, answer and stipulation of settlement all filed on same day in nationwide asbestos action); Bowling v. Pfizer, Inc., 143 F.R.D. 141 (S.D.Ohio 1992) (heart valves). As a general matter, of course, settlements are to be encouraged, but not at any price. Settlement classes, in any setting, offer serious potential for abuse. See, e.g., Manual for Complex Litigation, Second, supra, § 30.41, at 236 ("As a practical matter, the dynamics of class action settlement may lead the negotiating parties--even those with the best of intentions--to regard the interests of the class members too lightly."). In a class action,

the pressures for settlement are oftentimes overwhelming. From the perspective of defendants, settlement is an opportunity to cap risk. From the perspective of the courts, settlement is an opportunity to clear calendars--of, at times, literally tens of thousands of cases in one grand gesture. From the perspective of class counsel, the economic stakes are monumentally enticing.

The individual victim's interest is too often ignored in the sweep of more powerful forces. The right to opt out remains the individual's sole fail-safe. It also serves as a check on the entire process, since the potential of opt-outs provides some incentive for parties negotiating a settlement to be more respectful of the rights of these absent class members.

Eliminating the right to opt out in these circumstances would be a fundamental breach of the constitutional rights of individual class members. These constitutional principles cannot be abrogated on the basis of claims of a crisis in the system. In the first place, contentions that mass tort cases are overwhelming the federal court system are simply erroneous. Indeed, a review of the empirical evidence demonstrates that there has been a decrease in tort filings in recent years.[19] The

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[19] Study after study--of empirical data--refute the extreme rhetoric of the tort "reform" movement. Thus, even "[t]he most comprehensive studies--by experts sympathetic to the tort reform cause--indicate that, except for the special case of asbestos litigation, product suits have declined sharply--by 40 percent--over the past five years." Kenneth Jost, Tampering With Evidence: The Liability and Competitiveness Myth, A.B.A. J. 44, 45 (Apr. 1992). From the period 1975 to 1985, "torts constituted a shrinking proportion of the federal civil caseload"--with filings falling from 22 percent to 15 percent of all federal cases. Michael J. Saks, Do We Really Know Anything About the Behavior of the Tort Litigation System--And Why Not?, 140 U. Pa. L. Rev. 1147, 1200 (1992) (emphasis in original). At the same time, tort cases were "far overshadowed" by growth in contract litigation, social security cases and recovery of federal overpayments. Id. at 1200-01. Indeed, the Wall Street Journal recently reported that "[b]usinesses may be their own worst enemies when it comes to the so-called litigation explosion. Preliminary

one exception to this trend is the asbestos litigation, where decades of willful misconduct on the part of an entire industry has caused unparalleled death and disease. Clearly, asbestos victims--and other victims of mass torts--must not be called upon for further sacrifices, including the forfeiture of their constitutional rights.[20]

Moreover, some principles simply do not yield, even for the sake of so-called efficiency. As this Court has stated:

> [T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

Fuentes v. Shevin, 407 U.S. 67, 90 n.22 (1972) (quoting Stanley v. Illinois, 405 U.S. 645, 656 (1972)).

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data in the first-ever study of litigation patterns of Fortune 1000 companies show that businesses' contract disputes with each other constitute the largest single category of lawsuits filed in federal court." Suits by Firms Exceed Those By Individuals, Wall St. J., Dec. 3, 1993, at B1.

[20] Of course, if petitioners succeed in their arguments that Shutts applies only in state courts, significant forum shopping would lead to an increase in nationwide class actions in federal courts, multiplying the caseload burdens that petitioners decry.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Ninth Circuit should be affirmed.

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